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Voting During a Pandemic
Vote-By-Mail Challenges for Native Voters

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Coming into 2020, it was apparent that this would be a momentous year. The summer Olympics would be held in Tokyo. The United States Census Bureau would conduct the decennial Census, which is used for reapportioning seats in the House of Representatives among the states, redistricting to meet equal population requirements, and producing data used for federal appropriations over the next 10 years. Party caucuses and primaries were to begin in early February, culminating in the presidential election in November.

Most of those events will still happen. But the timing and the way in which they are conducted may change significantly due to the COVID-19 pandemic. The 2020 Olympics have been postponed a year and will not commence until July 2021. In mid-March, the Census Bureau announced it was delaying its in-person field operations. In mid-April, the Bureau requested that Congress extend the statutory deadlines by 120 days to complete the decennial Census, report the reapportionment numbers to the President and prepare the data files used for redistricting. On March 19, California became the first state to issue a stay-at-home order. Arizona followed on March 31, along with most of the remaining states.
Elections proved that they were not immune to the pandemic’s effects. Arizona held its primary on March 17, but it was one of the last states to do so. Sixteen states postponed their primaries because of the pandemic.5 Despite a stay-at-home order, the closure of all non-essential businesses, and limits on the size of gatherings, Wisconsin proceeded with in-person voting during its primary on April 7—and was widely criticized for doing so.6 Milwaukee closed 175 of 180 polling locations, resulting in long lines and increased risks.7 A terrible price may have resulted from the election. It was reported that over 50 people who voted in-person during the Wisconsin primary tested positive for the COVID-19 virus within two weeks of voting.8

Against this backdrop, there is an increasing call for alternatives to in-person voting, such as Vote-By-Mail (“VBM”). Nationally, polls show that a clear majority of Americans support VBM, with approximately two-thirds in favor. While there is some partisan disagreement about VBM—those who identify as Democrats or Independents overwhelmingly favor it compared to 40 percent of Republicans—that divide tends to evaporate in states that already use it.9 A Pew survey reported that 68 percent of Republicans in those states support it.10 Several bills have been introduced in Congress that would mandate making VBM an option for conducting federal elections in November 2020.11

Elections conducted by VBM have been on the rise. In 1972, only four percent of all ballots were cast by mail. By 2008, 30 percent of all ballots nationwide were cast by mail. In some states that offered a mail-in voting option, up to half of all ballots were cast using that option. According to the National Conference of State Legislatures (NCSL), by the end of 2019, at least 22 states currently use some form of VBM for their elections, with three states (Colorado, Oregon and Washington) conducting all voting by mail.

Arizona first made VBM available to all voters in 1998. Arizona law provides, “Any election called pursuant to the laws of this state shall provide for early voting. Any qualified elector may vote by early ballot.”12 The 2010 election marked the first time that more than half of all ballots cast in Arizona were through VBM.13 Currently, approximately 80 percent of all Arizonans receive their ballot by mail.14 NCSL explains how VBM commonly works:

The voter marks the ballot, puts it in a secrecy envelope or sleeve and then into a separate mailing envelope, signs an affidavit on the exterior of the mailing envelope, and returns the package via mail or by dropping it off. Ballots are mailed out well ahead of Election Day, and thus voters have an “election period,” not just a single day, to vote. … [T]his does not preclude in-person voting opportunities on and/or before Election Day. For example, despite the fact that all registered voters in Colorado are mailed a ballot, voters can choose to cast a ballot at an in-person vote center during the early voting period or on Election Day (or drop off, or mail, their ballot back).15

VBM is a viable option for many voters. However, it is not a panacea for the challenges of voting during a pandemic. For many voters, especially Native Americans and others living in remote or rural areas, casting a ballot by mail is not possible. As a result, the Inter Tribal Council of Arizona opposes having all ballots cast through VBM.16 One tribal member from Montana went even further, describing VBM as “regressing … I would see it as a Jim Crow law.”17 This article explains why having in-person and related voting options are necessary to ensure that those living in Indian Country have a voice in the political process.

Disparities Affecting Native Voter Access

Members of the 574 federally recognized tribes18 face many barriers to political participation. Although many other American voters share some of these obstacles, no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native (AIAN) population. “First generation” voting barriers—those that prevent eligible people from registering to vote, casting a ballot, and having that ballot counted—remain the dominant paradigm in Indian Country. Those obstacles often are exacerbated by the general disparities that Native voters face when trying to participate in non-tribal elections.

Historical Distrust of the Federal Government

It is impossible to fully understand voting barriers in Indian Country without starting with the bad relationship the indigenous population has had, and continues to have, with the federal government. Antipathy and distrust persist toward federal, state and local governments because of past (and in some cases ongoing) actions that discriminate against Natives or that undermine the preservation of their culture and heritage.

In a recent survey of 2,800 Native voters in four states, including Arizona, Native voters expressed the greatest trust in their Tribal Governments. Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.19 Those negative experiences often are exacerbated and reinforced when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. This distrust also helps to explain why many Native voters choose not to cast a ballot using VBM.

Geographic Isolation

While 84 percent of the U.S. population lives in urban areas,20 many Native Americans live in rural communities. The isolated locations of tribal lands contribute to the political exclusion of Native Americans. Approximately one-third of all American Indians and Alaska Natives live in Hard-to-Count Censuses Tracts—roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.21 The states with the greatest percentage of the Native population in such tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent) and Alaska (68.6 percent).22 Geographic isolation is a significant reason states like Arizona have such a large percentage of their Native population in Hard-to-Count areas.

Isolation due to physical features such as mountains, canyons, oceans, rivers and
vast expanses of unoccupied land are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable transportation to travel the vast distances to county seats, election offices and post offices. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held and VBM ballots are returned.

**Socioeconomic Barriers**

Socioeconomic barriers likewise make the voting process less accessible for Native Americans. Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.24 The poverty rate is even higher on Indian reservations and in Alaska Native villages, at 38.3 percent.24 The median household income of single-race AIAN households in 2016 was $39,719, far below the national median household income of $57,617.25

Native Americans also have lower rates of educational attainment. Among the AIAN population 25 years of age and older, 20.1 percent had less than a high school education. The unemployment rate of those aged 16 and older in the workforce was 12 percent. Approximately 19.2 percent lacked health insurance, and 13.4 percent of all occupied households lacked access to a vehicle, making it impossible to travel great distances to register and vote.26

**Language Barriers and Illiteracy**

Dozens of different dialects are widely spoken among the major AIAN languages. Over a quarter of all single-race AIANs speak a language other than English at home.27 Two-thirds of all speakers of AIAN languages reside on a reservation or in a Native village,28 including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.29

Alaska, Arizona and New Mexico have the largest number of Limited-English Proficient (LEP) persons voting-age citizens (that is, U.S. citizens who are 18 years of age and older). Between them, they account for approximately 87 percent of all AIANs who reside in an area required to provide language assistance in an AIAN language under Section 203 of the Voting Rights Act.30

Illiteracy also is very prevalent among LEP AIANs, especially among Tribal Elders. In Alaska, in Section 203-covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabascan-speakers, 15 percent for Yup’ik-speakers, and 8.2 percent for Inupiat-speakers.31 In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.32 Similar levels of illiteracy are prevalent in other areas of Indian Country.

**Lack of Broadband Access and Internet Use**

Among all population groups, the digital divide is most profoundly felt in Indian Country. People residing in tribal areas have virtually no access to computers or the internet,
with the Federal Trade Commission estimating broadband penetration in tribal communities at less than 10 percent. Not surprisingly, the hardest to count Census areas for the rural AIAN population are all on reservations or in Alaska Native villages lacking reliable and affordable broadband access. To illustrate that fact, a mapping tool shows how Hard-to-Count Census Tracts correlate with reservations.

Members of the 574 federally recognized tribes face many barriers to political participation. No other racial or ethnic group faces the combined weight of these barriers to the same degree.

Barriers That VBM Imposes on Native Voters

VBM is not a simple or easy task for Native American voters. In addition to general barriers impeding voting access, VBM adds an additional layer of challenges. Lack of home mail delivery, the need for language translations, and lack of access to public transportation and vehicles impede voter participation by mail. In general, VBM is not as accessible for Native Americans living in tribal communities as it for voters in urban areas. In fact, an all-VBM system can effectively eliminate voting opportunities for some AIAN communities if no polling locations are located within their communities.

Housing Instability, Homelessness and “non-Traditional” Addresses

VBM is premised on what appears to be a simple concept in Arizona: Any registered voter can inform their county elections office that they want a mail-in-ballot, which will be mailed to them and returned by the deadline. Despite its seeming appeal, that concept readily breaks down in much of Indian Country, primarily for two reasons: housing instability/homelessness and lack of a physical address where election materials will be mailed.

According to the 2016 ACS, only 52.9 percent of single-race AIAN householders owned their own home, compared to 63.1 percent of the total population. AIANs also experience high levels of literal homelessness and near homelessness.

When defining “literal homelessness” as living on the street and “near homelessness” as living in a place that is not one’s own (e.g., not having their own home—couch surfing, living with a friend, doubling up), the Department of Housing and Urban Development (HUD) discovered that 99.8 percent of tribes surveyed said that their members experience near homelessness and 88 percent of tribes also stated that, despite “doubling up” or living with a friend, their members also experience literal homelessness. HUD has estimated that, out of 399,400 households in tribal areas, 67,900...
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son voting location to vote. Changes to and closure of polling locations and anything that increases costs, such as increased travel and distance, decreases voter turnout. The decreased socioeconomic status affects the ability of the Native voter to bear the additional costs.

VBM also results in ballots not being counted and is concerning for LEP voters. Ballots cast by mail are 10 times more likely to be rejected than votes cast in-person. VBM requires that multiple steps be completed in order for the ballot to count, resulting in more risks that the ballot will not be counted or “lost” as compared to in-person voters. In the 2008 election, approximately 4.1 million votes were lost in the VBM pipeline. The primary problem was unfulfilled ballot requests; other problems included rejection of ballots for failure to sign the ballot, failure to return the ballot timely, and mistakes marking the ballot. For reservation voters, it can take a week to receive mail, and a week to return mail due to the circuitous route of mail delivery, making VBM an unreliable option.

Following the 2018 election, the Navajo Nation and Navajo voters filed suit arguing that the lack of language assistance in the VBM process violated Section 203. Even though there is low participation in VBM on the Navajo Reservation, over 100 ballots were discarded for failure to sign the ballot affidavit. These voters were neither properly instructed in the Navajo language on how to complete the ballot and were not given an opportunity to cure the deficiency, violating Section 203, and the lack of curing violated the Equal Protection and Due Process clauses of the U.S. Constitution.

Marginalized communities show a greater rate of ballot rejection, and “[m]ail-in ballots in Apache and Coconino counties were rejected for missing signatures at twice the statewide rate.” Although the settlement agreement in that case required the Secretary of State to include a ballot-curing provision in the election manual to allow unsigned ballot voters the same amount of time to cure as those with mismatched signatures and those who fail to show ID on election day, the Attorney General quashed that change.

Because curing is not equally accessible, a VBM system would further disenfranchise Native voters in Arizona.

Lack of home mail delivery, the need for language translations, and lack of access to public transportation and vehicles impede voter participation by mail.
**The Need For Ballot Collection**

In *DNC v. Hobbs*, plaintiffs challenged the validity of Arizona’s ballot collection law, which criminalized the collection and delivery of another person’s ballot. Until the state Legislature enacted H.B. 2023, Arizona did not restrict third parties from collecting or dropping off completed early ballots. Due to various factors, such as lack of access to reliable mail and lack of transportation, minority voters relied heavily on third-party assistance to return their early ballots as compared to non-minority voters. A similar law failed to receive preclearance approval from the Department of Justice when Arizona was covered under Section 5 of the Voting Rights Act.

An en banc panel of the Ninth Circuit found that Arizona’s ballot collection law violated Section 2 of the Voting Rights Act and disproportionately impacted Native Americans and other minorities. The Court also found that the law was passed with discriminatory intent in violation of the Fifteenth Amendment to the U.S. Constitution.

Due to the mail issues, lack of transportation and general disparities noted above, ballot collection can ensure that a Native voter’s ballot arrives to the county or polling location in order to be included in the count. Also, because many voters rely on others to deliver and return mail, it is likely that Native voters would violate the ballot collection law just by engaging in their regular activities of assisting their neighbors.

**Cultural Issues Favoring In-Person Voting**

Many Native voters reject VBM because it is antithetical to their culture of in-person civic participation. “[P]eople like to vote in person, because there’s a community attitude, almost carnival-like attitude.” Tribes create a festive environment with food and events to encourage Native voters to participate. A consistent theme is that Native voters on both reservations and in urban areas “want to go into a space” to vote, such as polling place in their community.

The preference for in-person voting also has its roots in the high levels of distrust that Native voters have for non-tribal government. Native voters have “the least trust in the local levels” of non-tribal government, such as the state and county officials running the elections. That distrust is manifest in their opinions on VBM compared to other methods of casting ballots. About 89 percent had at least some trust that their in-person ballot would be counted. “Vote by mail, in contrast, garnered much lower levels of trust. Only 24 percent had complete trust. And the same percentage, 24 percent, had no trust in voting by mail.” The high levels of distrust for VBM show that it “is not a viable substitute for in-person or voting at an early election site someplace where the individuals put the ballots themselves in the box.”

The voting experiences of Native voters corroborate their lack of trust that their mail-in ballot will be counted. In the 2016 election in Arizona, voters at the Bylas precinct on the San Carlos Reservation and the Pasqua Yaqui Tribal precinct were told they had to vote by provisional ballot because they were either on the permanent early voting list, and in one case a voter was told she had “voted early already, even though she insisted that she had not.”

The negative experience that Native voters continue to have with non-tribal governments plays a significant role in their fear of VBM. Researchers found that Native voters did not want to put their address on the mail-in ballot because they believed that their address would be used to discriminate against them. This is a remarkable finding because it so closely parallels the experience of African-American voters in the South.

Native voters also expressed concerns that VBM is less secure than voting in a polling place. The lack of security increases the distrust that some voters have in the process.

**Conclusions: The 2020 Election and Beyond**

While social distancing and reducing contact are important measures for the 2020 election, states and counties have a duty and responsibility to provide accessible voting to all voters. Instead of trying to force all voters to cast a ballot by mail, which may be rejected, election officials can do a variety of things to increase voting opportunities while reducing contact.

Expand in-person voting opportunities. Indian Country has unequal access to early voting, and expanding early voting to Tribal lands during the early voting period will reduce lines and in-person contact on election day. Pinal County purchased a mobile voting unit, designating it as an early voting location. This will allow the county to reach more voters during the early voting period.

Maintain polling locations on Tribal lands.

Provide additional opportunities for elderly and sick voters to vote at home by advertising the use of special election boards.

Increase the use of curbside and/or drive through voting.

Inform voters of the changes and additional opportunities to address potential fears of contact and to inform them of measures being taken to address health concerns.

For those who do vote by mail, add drop-box locations to Tribal lands and depurate Tribal employees as election officials to collect and receive ballots.

Election officials should coordinate with Tribal officials to ensure that they are working together to address the needs of Tribal voters.

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**endnotes**


https://nyti.ms/30NSnns.
5. See Nick Corasaniti & Stephanie Saul, 16 States Have Postponed Primaries During the Pandemic. Here’s a List, N.Y. Times (May 5, 2020), available at https://nyti.ms/2C-cqtfHm.
10. See Aaron Blake, A very interesting number on GOP support for vote-by-mail, WASH. POST (Apr. 28, 2020), available at https://wapo.st/2N75qHh.
11. See Alex Seitz-Wald & Sahil Kapur, Corona-virus has ignited a battle over voting by mail. Here’s why it’s so controversial, NBC News (Apr. 7, 2020), available at https://nbcnews.to/3c7NEke.
13. See Archived Table: Voting by Mail, N.Y. Times (Oct. 7, 2012), available at https://nyti.ms/3fEKQeV.
17. Id. (quoting Sharon Stewart-Peregoy).
21. Hard-to-Count Census Tracts include those Census Tracts “in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method.” See The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at https://bit.ly/2ACvno8.


27. 2016 AIAN FFF, supra note 23 (27 percent).


32. See id. In Arizona, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 19.1 times higher for Navajo-speakers; and 5.2 times higher for Apache-speakers.


35. See 2017 AIAN Summary, supra note 25.


37. Id. at 79.

38. Id. at 82.

39. Id. at 85.


45. Id.

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48. Id. at 12.
53. Id. (quoting Alta Edison).
54. Id. (quoting Natalie Landreth, Sarah Gonski, Steve Titla and Darrell Marks).
55. Id. (quoting Rani Williams, Patty Hansen and Darrell Marks).
56. Id. (quoting Henry Cagey).
61. ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 34 (2016).
64. Id. at 4.
65. Id. at 7.
67. Id. at 589-90.
71. DNC v. Hobbs, No. 18-15845 (9th Cir. Jan. 27, 2020) (en banc).
73. Id. (quoting Max Zuni).
74. Id. (quoting Chrissie Castro).
75. Id. (quoting Jean Schroedel).
76. Id. (quoting Natalie Landreth).
77. Id. (quoting Solveig Parson).
78. Id. (quoting Joseph Dietrich).
79. See generally James Thomas Tucker, Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote, 43 How. L.J. 343, 345-46 (2000) (summarizing evidence of how efforts by black voters to register subjected them to discrimination including “losing their job or their business, hav[ing] loans denied to them, see[ing] their rent increase, be evicted from their home, or have basic government services taken away after local newspapers printed their name so that everyone in the community would know what they had done”).